

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JORD O. HALE,

Petitioner and Appellant.

vs.

LAWRENCE E. WILSON, Warden
San Quentin State Prison,
Tamal, California,

Respondent and Appellee.

No. 20755 ✓

APPELLEE'S BRIEF

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FILED

APR 20 1966

WM. B. LUCK, CLERK

TOPICAL INDEX

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE CASE	2
SUMMARY OF APPELLEE'S ARGUMENT	4
ARGUMENT	
I. APPELLANT'S PLEA OF GUILTY FORE- CLOSES COLLATERAL ATTACK UPON HIS CONVICTION ON THE GROUND THAT IT WAS IMPELLED BY ILLEGALLY OBTAINED EVIDENCE.	4
II. THE RULE OF <u>ESCOBEDO</u> SHOULD NOT BE APPLIED RETROACTIVELY.	7
III. APPELLANT'S CONTENTION THAT HIS PLEA OF GUILTY WAS OBTAINED BY REASON OF HIS ATTORNEY'S DERE- LICTION OF DUTY IS NOT SUPPORTED BY HIS ALLEGATIONS.	8
CONCLUSION	9

TABLE OF CASES

	<u>Page</u>
<u>Carrizosa v. Wilson,</u> 244 F.Supp. 120 (N.D.Cal. 1965)	3, 7
<u>Davis v. United States,</u> 347 F.2d 374 (9th Cir. 1965)	5
<u>Escobedo v. Illinois,</u> 378 U.S. 478 (1964)	3, 4 n., 7
<u>Harris v. United States,</u> 338 F.2d 75 (9th Cir. 1964)	5, 6
<u>In re Seiterle,</u> 61 Cal.2d 651 (1964)	5
<u>Morse v. United States</u> 295 F.2d 30 (8th Cir. 1961)	6
<u>Sullivan v. United States</u> 315 F.2d 304 (10th Cir. 1963), <u>cert. denied</u> , 375 U.S. 910	6
<u>Townsend v. Burke,</u> 334 U.S. 736 (1948)	5
<u>United States v. Kniess,</u> 264 F.2d 353 (7th Cir. 1959), <u>cert. denied</u> , 359 U.S. 947	6
<u>United States v. Miller,</u> 293 F.2d 697 (2d Cir. 1961)	6
<u>Waley v. Johnston,</u> 139 F.2d 117 (9th Cir. 1944), <u>cert. denied</u> , 321 U.S. 779 (1944)	6
<u>Wallace v. Heinze,</u> 351 F.2d 39 (9th Cir. 1965)	6
<u>Watts v. United States,</u> 278 F.2d 247 (D.C. Cir. 1960)	6

FOR THE NINTH CIRCUIT

Respondent and Appellee.

No. 20755

STATEMENT OF THE CASE

On November 18, 1960, appellant was convicted in the Superior Court of Merced County, California, on his plea of guilty to charges of kidnaping for the purpose of robbery in violation of section 209 of the California Penal Code and armed robbery in violation of section 211 of the California Penal Code.^{1/}

Appellant was sentenced to the state prison for the terms prescribed by law on each count, to be served concurrently, and took no appeal from his conviction (Appendix p. 2; AOB 2; CT 2).^{2/}

Subsequently, however, appellant applied to the Superior Court of Marin County for a writ of habeas corpus. This petition was denied on September 15, 1965. A similar habeas corpus petition was denied by the California Supreme Court on November 10, 1965 (CT 5-6).

On December 2, 1965, appellant filed an

1. Since an order to show cause was not issued by the District Court, respondent-appellee did not have the opportunity to file a formal return. For the convenience of this Court, a copy of the judgment is included in an appendix to this brief.

2. As used herein, "AOB" refers to appellant's opening brief. "CT" refers to the transcript of record filed in this Court, constituting the United States District Court Clerk's record on appeal.

application for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (CT 1-22). On that same date the District Court filed its order denying the petition on the ground that appellant's conviction rested upon a plea of guilty entered pursuant to consultation with and advice of counsel; that a confession allegedly obtained from appellant in violation of Escobedo v. Illinois, 378 U.S. 478 (1964), was as a consequence not used as evidence against him; and that since under Carrizosa v. Wilson, 244 F.Supp. 120 (N.D.Cal. 1965), Escobedo could not be applied retroactively, there was no basis for concluding that appellant's plea was impelled by an improperly obtained confession (CT 23-24).

Appellant thereafter filed a petition for rehearing on December 14, 1965 (CT 25-29). The District Court denied the petition on December 22, 1965, after noting that appellant had not raised any matters not previously considered by the court's original order denying the petition for writ of habeas corpus (CT 30).

Thereafter, on January 13, 1966, the District Court filed an order granting appellant's application for a certificate of probable cause and granted appellant leave to appeal in forma pauperis (CT 38).

SUMMARY OF APPELLEE'S ARGUMENT

I. Appellant's plea of guilty forecloses collateral attack upon his conviction on the ground that it was impelled by illegally obtained evidence.

II. The rule of Escobedo should not be applied retroactively.

III. Appellant's contention that his plea of guilty was obtained by reason of his attorney's dereliction of duty is not supported by his allegations.

I

APPELLANT'S PLEA OF GUILTY FORE- CLOSES COLLATERAL ATTACK UPON HIS CONVICTION ON THE GROUND THAT IT WAS IMPELLED BY ILLEGALLY OBTAINED EVIDENCE.

Appellant contends that as a result of unlawful police action, he made statements to the prosecutor amounting to a confession of the crimes charged against him (CT 13; AOB 5-6).^{3/} As appellant's allegations establish, and as the District Court found, appellant's plea of guilty, which was entered upon the withdrawal of his original plea

3. In his petition and papers before the District Court, appellant sought by his allegations to bring his case within the rule of Escobedo v. Illinois, 378 U.S. 478 (1964) (CT 15-17). The District Court dealt with the petition upon this basis. Appellant's opening brief filed in this Court, however, fails to mention Escobedo, and instead he argues that his alleged confession was obtained by coercion and harassment (AOB 7-8).

of not guilty, resulted from the advice of his attorney (CT 15, 19-20; AOB 6-7). Appellant's allegations disclose that when he finally did enter his guilty plea he knew that the district attorney could make no deals or promises to him, he knew that his crime partners had agreed to plead guilty, and he decided to enter a guilty plea himself only after consultation with his attorney in the presence of his wife and brother (CT 14-15; AOB 5, 7).

Appellant's plea of guilty, entered upon advice of counsel, forecloses any consideration of his claims. As the District Court properly recognized, his alleged confession was not used to convict him; his conviction was based upon his plea of guilty. Townsend v. Burke, 334 U.S. 736 (1948); Wallace v. Heinze, 351 F.2d 39 (9th Cir. 1965); Davis v. United States, 347 F.2d 374 (9th Cir. 1965); Harris v. United States, 338 F.2d 75 (9th Cir. 1964); In re Seiterle, 61 Cal.2d 651 (1964). In the Harris case this Court said:

By his plea of guilty appellant foreclosed his right to raise objections to the manner in which evidence upon which he was indicted was obtained. This evidence, because of his guilty plea, was not used against him. Had he stood trial his objection to its introduction, if made and overruled by the trial

court, could have been raised on appeal. Under the circumstances he may not belatedly raise the contention under 28 U.S.C. § 2255. Eberhart v. United States, 9 Cir., 1958, 262 F.2d 421 . . . The conviction and sentence which follow a plea of guilty are based solely and entirely upon said plea and not upon any evidence which may have been improperly acquired by the prosecuting authorities. United States v. French, 7 Cir., 1960, 274 F.2d 297; United States v. Sturm, 7 Cir., 1950, 180 F.2d 413; Kinney v. United States, 10 Cir., 1949, 177 F.2d 895." Harris v. United States, supra at 80.

Even if petitioner's decision to plead guilty was influenced by the allegedly illegally obtained evidence, the federal courts have consistently held that a claim that inadmissible evidence induced a plea of guilty is no basis for setting aside a conviction. Sullivan v. United States, 315 F.2d 304 (10th Cir. 1963), cert. denied, 375 U.S. 910; Morse v. United States, 295 F.2d 30 (8th Cir. 1961); United States v. Miller, 293 F.2d 697 (2d Cir. 1961); Watts v. United States, 278 F.2d 247 (D.C. Cir. 1960); United States v. Kniess, 264 F.2d 353 (7th Cir. 1959), cert. denied, 359 U.S. 947; Waley v. Johnston, 139 F.2d 117 (9th Cir. 1944), cert.

denied, 321 U.S. 779 (1944).

II

THE RULE OF ESCOBEDO SHOULD NOT BE APPLIED RETROACTIVELY.

Appellant seeks to upset his conviction by urging a retroactive application of the exclusionary rule of Escobedo v. Illinois, 378 U.S. 478 (1964). Even if his statements had been introduced into evidence, Escobedo would not be applicable. Appellant's conviction became final in 1960, four years before the Escobedo decision. The United States District Court, Northern District of California, Southern Division, has ruled in Carrizosa v. Wilson, 244 F.Supp. 120 (N.D.Cal 1965), that Escobedo is not to be applied retroactively. The District Court below rejected appellant's contention, basing its conclusion on that authority. Carrizosa is before this Court (No. 20304) and the issue of the retroactivity of Escobedo has been extensively briefed therein by the Office of the Attorney General of California. Additional copies of the Carrizosa brief have been filed with this Court for its use in the instant appeal and a copy has been served upon appellant Hale. The argument as presented in the Carrizosa brief is hereby incorporated by reference into this brief, and, we submit, completely disposes of appellant's contention

in this regard. The District Court therefore properly rejected the contention.

III

APPELLANT'S CONTENTION THAT HIS PLEA OF GUILTY WAS OBTAINED BY REASON OF HIS ATTORNEY'S DERELICTION OF DUTY IS NOT SUPPORTED BY HIS ALLEGATIONS.

Although he did not raise the point in the District Court, appellant here contends that his plea of guilty was due at least in part to ineffective aid of counsel in the preparation and investigation of his case (AOB 9-11). On the contrary, appellant's own allegations disclose that he was represented by counsel during the preliminary examination and that the attorney took an active part in the proceedings (CT 15; AOB 6-7). Within a few days after appellant apparently had been held to answer for trial on the charges, his attorney advised him for the first time that a guilty plea would be in his best interest. Nevertheless, contrary to the advice of his attorney, appellant, together with his crime partners, allegedly entered pleas of not guilty in superior court. However, appellant's allegations disclose that prior to the date set for trial, he again conferred with his attorney, this time in the company of his wife and his brother (CT 15, 19-20). As a result of this discussion, appellant ultimately entered his plea of guilty which formed the basis for his

conviction. The District Court properly found that upon the allegations made by appellant in his petition before that court, the advice of the attorney cannot be said to be defective. Clearly, appellant's allegations do not support his contention here that he was denied effective aid of counsel.

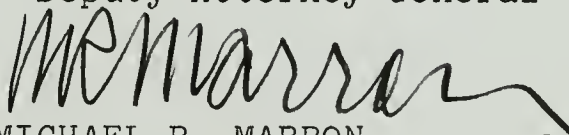
CONCLUSION

For the reasons stated, it is submitted that the order of the District Court denying appellant's petition for writ of habeas corpus should be affirmed.

DATED: APRIL 20, 1966

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General



MICHAEL R. MARRON
Deputy Attorney General

Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: APRIL 20, 1966


MICHAEL R. MARRON
Deputy Attorney General

A P P E N D I X

A-12347 CASE NOS. 5089

In the Superior Court of the State of California

IN AND FOR THE COUNTY OF **MERCED**

Abstract of Judgment (Commitment to State Prison)

The People of the State of California,

Plaintiff

v.s.

J. O. HALE,

Defendant

Present:

Hon.

R. R. SISCHO

Judge of the Superior Court

STEPHEN P. GALVIN

Prosecuting Attorney

DONALD R. FRETZ,

Counsel for defendant

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This certifies that on **Nov. 18**, 19 **60**, judgment of conviction of the above named defendant was entered as follows:

(1) Case No. **5089** Count No. **I and II**

On his plea of **"Guilty"**

he was convicted by **the Court** of **a felony, to wit: Kidnapping for Purposes of Robbery, in violation of Sec. 209 of the Calif. Penal Code; and Robbery, a felony, (First Degree) in violation of § Sec. 211 of the Calif. Penal Code.**

~~With this felony conviction of~~

that

felony conviction of

crime

with this

Defendant **was** armed with a deadly weapon at the time of his commission

of the offense or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Section 3024.

THIS INSTRUMENT IS A
TRUE COPY OF THE ORIGINAL
FILED IN THIS OFFICE

CLERK OF COURT
J. O. HALE

R. P. Powers

*Insert: guilty, not guilty, former conviction or acquittal, or, in jeopardy, not guilty by reason of insanity.
Insert: designation of crime and degree of any, including fact that it constitutes a second or subsequent, if that affects the sentence.
Insert: reference to code or statute, including section and subsection thereof, if any violated.

State of California, County of Merced, Superior Court, Case No. 5089, Judgment of Conviction, Commitment to State Prison (Pen. C. Sec. 12115-12116)

(2) Defendant **was not** ^(was or was not) adjudged an habitual criminal within the meaning of Subdivision **a or b** ^{(a) or (b)} of Section 61 of the Penal Code and the defendant **is not** ^(is or is not) an habitual criminal within the meaning of Section 61 of that section.

(3) It is Therefore Ordered, Adjudged, and Decreed that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law and that he be remanded to the Sheriff of the County of **Merced** and to the Director of Corrections of the State of California at **the Reception & Guidance Center, Vacaville, Calif.,**

It is ordered that sentences shall be served ^{concurrently or consecutively} **concurrently and not consecutively.**

and in respect to any prior uncompleted sentence/ as follows:

(4) To the Sheriff of the County of **Merced** and to the Director of Corrections at **the Reception & Guidance Center, Vacaville, Calif.,**

Pursuant to the aforesaid judgment this is to command you, the said Sheriff, to deliver the above named defendant into the custody of the Director of Corrections at the **Reception & Guidance Center, Vacaville, Calif.,** at your earliest convenience.

Witness my hand and seal of said Court this **18** day of **Nov.**, 19**69**.

E. T. JOHNSON Clerk

By **Ruth Norman** Deputy
RUTH NORMAN

STATE OF CALIFORNIA

County of MERCED

} ss.

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

Attest my hand and seal of the said Superior Court this 18 day of
Nov. 19 60

E. T. JOHNSON

County Clerk and ex-officio clerk of the Superior Court of
the State of California

in and for the County of Merced

BY: Ruth Norman, Deputy

Ruth Norman
Judge of the Superior Court of the State of California in

R. R. SISCHO

and for the County of Merced

